STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 7, 2007
v	No. 264795 Livingston Circuit Court
JASON FRANK BAUMGARTNER, Defendant-Appellant.	LC No. 02-012842-FH

Before: Zahra, P.J., and Bandstra and Owens, JJ.

BANDSTRA, J. (*concurring in part and dissenting in part*).

I agree with the majority opinion except in its conclusion that the trial court's failure to instruct the jury on the necessarily included lesser offense was harmless.

Under *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), whether the concededly erroneous failure to provide the requested instruction on driving while impaired was harmless depends on the weight of the evidence presented to support defendant's theory of causation.[1] In other words, the failure to instruct was error because there was an "evidentiary dispute supported by a rational view of the evidence" regarding the causation element. *Cornell*, *supra* at 365. Nonetheless, that error was harmless unless "there [was] substantial evidence to support the requested instruction," *id*., or the evidence presented "clearly support[ed]" the requested instruction. *Id*. at 366. In *Cornell*, the court decided the error was harmless based on a review of evidence from all three people who broke into a house (including defendant's statement) suggesting that they did so with an intent to steal (the element in dispute). *Id*.

In contrast to *Cornell*, there is no such damning testimony here out of defendant's own mouth. Further, defendant's theory of causation was supported by ample evidence. On that issue, the trial was basically a battle of experts. The prosecutor presented the testimony of a Michigan State Police Officer, Sgt Megge, who concluded that defendant crossed the center line of the highway in front of decedent's motorcycle too late for it to stop. Defendant presented testimony from an accident reconstructionist, Nick Loridas, who criticized Megge's conclusions as being "meaningless" because they were based on "imaginary" or "arbitrary" assumptions.

[1] The failure to instruct would not be harmless simply because the causation element was at issue for the jury to determine with respect to the greater offense actually charged.

Loridas concluded that the accident was caused because of the speed of the motorcycle and a dip in the roadway which prevented defendant from being able to see the motorcycle in a crucial timeframe prior to the accident.

Faced with this evidence, some or all of the jurors may not have been convinced beyond a reasonable doubt that defendant's operation of the motor vehicle was the proximate cause of the accident. However, there was ample evidence that defendant was impaired while he operated the vehicle. Charged only with the greater offense, the jury had to completely exonerate defendant even though that was clearly the case or convict him even if there were reasonable doubts on the causation element.

Further, examination of the "entire cause" is required. *Id*. That includes the fact that, following a previous trial, the jury was unable to convict defendant, or acquit him, when, as here, it was presented with only the greater charge of operating a vehicle while visibly impaired causing death. In other words, the previous jury, faced with the same all or nothing option presented to the jury here, in effect decided that the truth was somewhere in the middle. That strongly suggests that the necessarily included lesser offense, for which an instruction was erroneously not provided, would have been most consistent with the evidence.

Considering the evidence presented by defendant in support of the necessarily included lesser offense instruction, the "all or nothing" conundrum faced by the jury here, and the fact that a previous jury was unable to reach a verdict when forced with the same dilemma, I cannot conclude that the erroneous failure to instruct did not probably undermine the reliability of the verdict against defendant. I would reverse and remand for imposition of a sentence on the lesser offense or another trial, at the prosecutor's discretion.

/s/ Richard A. Bandstra